No. 3833

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

WILLIAM R. CASTLE, LORRIN A. THURSTON, and ALFRED L. CASTLE, Trustees under the Will of JAMES BICKNELL CASTLE,
Plaintiffs-in-Error,

vs.

HAROLD K. L. CASTLE and the TERRITORY OF HAWAII,
Defendants-in-Error.

No. 3833.
In Error to the Supreme Court of Hawaii.

REPLY BRIEF OF THE TERRITORY OF HAWAII, ONE OF THE DEFENDANTS-IN-ERROR.

Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

HARRY IRWIN, Attorney General of Hawaii, Attorney for Territory of Hawaii, Defendant-in-Error.

Filed this.....day of.....1922

F. D. MONCKTON, Clerk,

By.....Deputy Clerk.

HONOLULU STAR-BULLETIN, LTD.

INDEX

INDEX OF AUTHORITIES

No. 3833

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

WILLIAM R. CASTLE, LORRIN A. THURSTON, and ALFRED L. CASTLE, Trustees under the Will of JAMES BICKNELL CASTLE,
Plaintiffs-in-Error,

vs.

HAROLD K. L. CASTLE and the TERRITORY OF HAWAII,
Defendants-in-Error.

REPLY BRIEF OF THE TERRITORY OF HAWAII, ONE OF THE DEFENDANTS-IN-ERROR.

Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

The opening statement contained in the brief filed by plaintiff-in-error is, in the main, correct and fully and correctly sets forth all the provisions of Hawaiian statutory law which are applicable and pertinent to the case now under consideration.

The statement that "all surplus income to accumulate during and with the remainder at the expiration of said annuity to be devoted to an educational charity" is however incorrect. In order that this error may be made clearly apparent and in order that all the questions involved in the proper construction of this will may be clearly understood it is deemed advisable to

first set out an analysis of the will under and by which the property in question was transferred to the trustees, the plaintiffs-in-error herein and showing the successive trusts which by that instrument were imposed on said Trustees.

Analysis of the Will.

The entire estate (except Mahuilani) was devised and bequeathed to the Trustees for the following purposes which, without taking into consideration the annuity to the widow and certain other small annuities all of which are eliminated from further consideration by rejection or the death of the annuitants, were to be executed in the order named in the will and as here set forth, namely:

(1) For the payment of debts and funeral expenses (Record 5);

(2) The rehabilitation of the Kona Development Company, Limited with authority in the Trustees to sell "old securities" for the purpose of liquidating the "heavy indebtedness" existing against this company (Record 5-6);

(3) The financing of the West Hawaii Railway Company and the Koolau Railway Company by the sale of $400,000.00 worth of the capital stock of Alexander & Baldwin, Limited (Record 6);

(4) For the carrying out of the purposes mentioned in paragraphs numbered 2 and 3 supra, including the extension of the Koolau Railway to Honolulu the executors and trustees are empowered "completely to deal with any and all securities which I may possess, and otherwise, so far as lies within their

power, to finance such enterprises as I would have the power to do were I living." (Record 7);

(5) *After the successful establishment* of the industries mentioned in paragraphs numbered 2, 3 and 4 supra to increase the annuity to the widow (Record 8);

(6) After the death of the widow to pay to the son an annuity of not less than $4,000.00 nor more than $40,000.00 (Record 9);

(7) To accumulate sufficient land and capital for the establishment of other agricultural enterprises for the introduction and employment in Hawaii of "a high class agricultural immigration of Northern races, preferably Scandinavian, Anglo-Saxon and Teutonic" (Record 9);

(8) (a) *Subject to the decision of the executors to devote either the excess income or the whole income of the estate "to any business enterprise whatsoever which they may approve"* and (b) after the fulfillments of the requirements upon the estate as set forth in paragraphs numbered 1 to 7 inclusive, supra, and (c) after the death of the widow and son and other beneficiaries "to accumulate the income toward an educational purpose to be initiated at such time as their judgment will determine the estate amply able to carry on *without closing its commercial character.*" (Record 10, 11);

(9) The powers vested in the Executors and Trustees to carry on any and all of said business enterprises are subject both as to extent and duration, only to their uncontrolled and unlimited discretion (Record 17).

ARGUMENT

For the purposes of this argument the questions raised by the various assignments of error may be grouped generally in two questions, namely,

(1) Was the tax on the annuity to Harold K. L. Castle payable by the annuitant or by the Trustees?

(2) Did the devise and bequests to the Executors and Trustees, according to the terms and conditions of the trust, constitute a taxable transfer under the Hawaiian Statute? (Assignments of error 1, 2, 4, 6, 7, 8 and 9.)

FIRST QUESTION:

Was the tax on the annuity to Harold K. L. Castle payable by the annuitant or by the Trustees?

The entire estate was transferred to the executors and trustees.

"All the rest of my estate, real, personal and mixed, I devise and bequeath to my executors and trustees hereinafter mentioned" (see Will, Record 5).

The executors and trustees took the entire estate, legal and equitable, subject only to the trusts imposed on them by the will. This brings this case squarely within the principles announced in *Estate of Brown,* 24 Haw. 443, where the Supreme Court of this Territory said:

"It should be borne in minds that the residuary clause transferred the estate, with the exception of the two small legacies mentioned, to the respondent and by express provision makes the payment to the petitioner of the sum of one hundred dollars monthly a charge upon the estate so transferred to the respondent.

Under our tax statutes, inheritance taxes are upon transfers in contemplation of death, and not upon the property transferred (Brown v. Treasurer, 20 Haw. 41; Robinson v. Treasurer, 22 Haw. 742, 748). The transfer of the property out of which the monthly payments to the petitioner are to be made is to the respondent, and not to the petitioner. A charge of this kind only creates a lien and does not transfer the estate or create an interest therein, the title to which passes to the devisee, and not to the party to whom the charge is payable. The will devolves upon respondent the duty of paying to petitioner the monthly payment of one hundred dollars, and it is apparent from the language used by the testator that he intended that such payments should be made without deduction for any cause whatever. Should petitioner die the payments would stop. Suppose she should die within one or two years the difference between the monthly payments made to her and the said valuation of $18,078.11 would remain in the hands of respondent to whom all of the residuary estate of testator passed under the will. The position of petitioner is analogous to that of a creditor where the will devises the estate to one with the charge that he shall pay the debt. Nothing would be transferred to the creditor by the will, yet it would create a lien upon the estate in his favor for the payment of his debt, and he would not be chargeable with the inheritance tax. No title or interest was transferred to the petitioner by the will; she was given a lien thereon for certain monthly payments of indeterminate value, notwithstanding the probable value thereof as shown by mortality tables. See Potter v. Gardner, 12 Wheat. 498; Rohn v. Odenwelder, 162 Pa. St. 346; 4 Kent's Com. 540. In Thayer v. Finnegan, 134 Mass. 62, the testatrix appointed her eldest son executor and gave him all her property, he to pay her debts and expenses of schooling her younger son. The Court held that such debts and expenses of schooling were charges upon the estate transferred to the eldest son. Nothing was transferred to either the creditors or younger son

but the payments of their debts in the one instance, and expenses of schooling the younger son in the other, were charges that created liens upon the estate. That case is analogous to the case at bar. The inheritance tax is payable upon the transfer of the residuary estate to respondent and not out of the monthly payments to be made to the petitioner. Many authorities have been cited to sustain the contention of respondent, but authorities, unless it appears that the cases decided were under similar statutory and testamentary provisions, are of no assistance here."

THE DECISION IN *ESTATE OF BROWN* IS CONTROLLING IN THIS CASE.

The argument in the Brown case is equally applicable here. Suppose Harold K. L. Castle should die within one or two years the difference between the annual payments made to him and the admitted value of the annuity of $183,165.53 (See Record 2) would remain in the hands of the trustees to whom all of the residuary estate of the testator passed under the will.

The case "Estate of Brown" was decided on August 30, 1918, and it is submitted that under our statute there is no such manifest error as would prevent the application of the rule of construction of a local Hawaiian law. Since the date of the decision in the Brown case there have been two regular and one special session of the Legislature of Hawaii and no attempt has been made to change or modify our Inheritance Tax statute in respect to the principles announced in said case. It is generally held that acquiescence on the part of the Legislature in a particular construction of a statute is indicative of legislative assent to such construction.

"When an act of Congress has, *by actual decision,* or by continued usage and practice, received a construction at the proper department and that construction has been acted on for a succession of years it must be a strong and palpable case of error and injustice that would justify a change in the interpretation to be given it."

2 Opp. Atty. Gen. 558.

"This construction (a decision by the Treasury Department) has been followed for many years *without any attempt of Congress to change it* and without any attempt so far as we are advised of any other department of the government to question its correctness except in the present case. The regulation of a department of the government is not of course to control the construction of an Act of Congress when its meaning is clear. But when there has been a long acquiescence in a regulation and by it rights of parties for many years have been determined and adjusted it is not to be disregarded without the most cogent and persuasive reasons."

Robertson v. Downing, 127 U. S. 607, 32 Law Ed. 269-271.

Under these authorities the fact that the Legislature of Hawaii during three sessions held subsequent to the decision in the Brown case failed to change or amend the statute which was then the subject of interpretation should be regarded as an acquiescence by the Legislature in that interpretation and as correctly expressing the intent of the Act.

THE DECISION IN *ESTATE OF BROWN* IS SUPPORTED BY AUTHORITY.

Counsel for plaintiff-in-error state in their brief on page 11 that, after an extensive search of authorities, they are unable to find a single decision of a court of last resort which holds that trustees are successors to legacies under state laws.

In this connection the Court's attention is respectfully invited to a consideration of the case entitled *Farkas vs. Smith,* 147 Ga. 503, 94 S. E. 1016.

That case was decided under a statute somewhat similar to ours and under a will very similar to the will in this case. The testator died leaving eight children. He devised and bequeathed his entire estate to five of these children in trust for the benefit of all for their lives with remainder over. The Trustees were given "entire control over the management and use of said "property", were authorized "to sell any part of the estate", "to continue any business that I (the testator) may be engaged in" or to "discontinue and sell the same." Upon the attainment of majority of the youngest grandchild the trust was to terminate and the estate distributed, per stirpes, among the direct descendants of the testator.

Section 1 of the Georgia Statute provides in part as follows:

"All property within the jurisdiction of this state, real and personal, *and every estate or interest therein* belonging to the inhabitants of the State—which shall pass on the death of the decedent by will—to any person or persons, bodies politic or corporate, in trust or otherwise, shall be subject to taxes."

Section 4 of the act makes provision for the method of levying the tax on estates less than fee.

Section 10 of the act makes provision for the taxation of limited estates and is almost identical in language with the last paragraph of Section 1323, R. L. H. 1915, as amended by Act 223, Session Laws 1917.

It was there contended that the provisions of said Sections 4 and 10, apportioning the tax where different estates are created in the same property were unenforceable when applied to the will of said Farkas on account of the peculiar character of the several estates created by the will.

The Supreme Court of Georgia in holding that the tax was properly levied on the whole estate which was transferred to the Trustees said:

"It is to be borne in mind that the tax is upon the transfer. A transfer might have resulted by operation of law as by inheritance in cases of intestacy, in which event there could have been no contingent or indefinite estates. The transfer under consideration, however, was not of that character. On the contrary, it was the case of a will. The will might have devised the property directly to those whom the testator intended should enjoy the bounty; or, some of those intended to enjoy the estate being minors and others being indeterminate, he could, under Section 1 of the Act, have made the bequest directly to a trustee, and let the usees enjoy the property thereafter. In this instance the testator resorted to that expediency. The statute contemplates cases of this kind, and by Section 1 it provides for taxing transfers made to a trustee. In such a case, if the trust comprehends the fee, legal title to the property passes, entirely out of the estate of the testator and into the trustee. This accomplishes a

transfer which is taxable within the meaning of the act; for there can be but one transmission by the testator, and, when it is to a trustee who takes the legal title to the fee, the trustee becomes the other party to the succession, and the taxable transmission becomes complete. In such instance the taxable transfer to the trustee is not "divided into two or more estates", within the meaning of Section 4 of the act. The broad language of the trust created by the will of Sam Farkas shows that the trustee took for the benefit of all the legatees under the will, thus causing the trust to extend to the fee. McLain vs. Rabon, 142 Ga. 163, 82 S. E. 544. This being true, there were no executory interests in remainder or otherwise attaching to the transfer, (the subject of taxation) within the meaning of the act and therefore there was no occasion for the separate assessment upon the property left by the testator. The trustee receiving the property in solido by the transfer to them, the entire tax would be payable out of the property in the first instance, as provided in Section 10 of the Act.

This case affords an example for applying sections 1, 4 and 10 of the act, and serves to illustrate the consistency between those provisions. The transmission of title, by operation of law or otherwise, from the trustees to the cestuis que trustent ultimately entitled to the enjoyment of the property, will not be taxable, because the statute imposes the tax upon but one transfer, namely, that from the testator to the trustee which went into effect at the death of the testator. In view of the complicated character of this will, it would be difficult to apportion the proper amounts of the tax against the separate interests of the various cestuis que trustent in the property, and much inconvenience and delay might be encountered by the state in collecting the tax. Broad powers were conferred upon the trustees over the property of the testator in the matters of sales and disposition of the property and conduct of the business left by the testator. However, any disposition of the property without payment of the tax would be subject to the lien of the tax, and to that

extent would be to the disadvantage and inconvenience of the trustees. On the other hand, if, by business misadventure or otherwise, the property left by the testator should be lost, or in any manner wasted, pending delay in paying the tax, it would operate to the inconvenience and injury of the state. Such possibilities, no doubt, were taken into account when the legislature provided for the tax in cases of transfers to trustees. The view which we take of this act, as applied to the will under consideration, brings us to the conclusion that the tax was properly levied in the hands of the trustees in solido."

It was exactly upon the theory set forth in the Georgia case, although in not the same language, that the Supreme Court of Hawaii in the Brown case said that "the transfer of the property out of which the monthly payments to the petitioner are to be made is to the respondent and not to the petitioner."

THE DECISION IN THE *ESTATE OF BROWN* IS IN CONFORMITY WITH THE AMENDMENT OF 1917 AS CONSTRUED BY OTHER COURTS.

Counsel for plaintiffs-in-error emphasize the fact that the law has been changed since the decision in the Brown case by Act 223, S. L. 1917, "wherein it is ordered that the tax on legacies should be paid 'out of the proceeds of the property transferred.'" (Brief 15.) Counsel here refer to that part of said Act 223, S. L. 1917, which is set forth in the last paragraph of Section 1323, R. L. H. 1915, as amended. (Brief 7 and 8.) A reading of that paragraph will convince the Court that it makes no such provision and that it simply provides, so far as this case is concerned, "when

property passes as provided herein in trust * * * such tax shall be due and payable forthwith by the executors or trustees out of the property transferred."

It is difficult to see how counsel can twist this plain provision of the statute into an order that the tax on an annuity should be paid out of the annuity.

The provisions of the New York statute are identical with those of the Hawaiian statute in this regard and *In re Vanderbilt's case,* 172, N. Y. 69, 64 N. W. 782, it was clearly held that under similar facts the tax on a contingent remainder was payable out of the corpus of the estate by the trustee.

In that case, the Court, by Mr. Justice Haight, after quoting the section of the New York law which is identical with ours said

"It seems to be clear that the legislature by this amendment intended to change the law upon the subject and to make the transfer tax upon property transferred in trust payable forthwith. The tax is not required to be paid by the conditional transferee for by the provisions of the statute it is 'to be paid out of the property transferred' so that whoever may ultimately take the property takes that which remains after the payment of the tax."

Mr. Justice Cullen in a concurring opinion said:

"It is conceded that the statute on its face provides for the immediate taxation of the whole corpus of the trust estate regardless of the fact that the persons who may ultimately receive either the whole or part of such corpus cannot now be ascertained, and for the payment of the tax out of the fund. I concede that if the statutory scheme creates a property tax it cannot be sustained. * * * But in my opinion the tax now sought to be imposed is not a property tax * * *.

The fact that the tax is to be paid out of the property does not render it a tax on property."

The New York Court of Appeals affirmed the decision In re Vanderbilt supra in a case entitled *In re Tracy, et al,* 179 N. Y. 501, 72 N. E. 519. That was a case where the testator devised and bequeathed certain property to trustees subject to certain life estates and estates in remainder and the Court said:

"In the case at bar it is the duty of the executors and trustees to ascertain the value of the respective life estates and estates in remainder * * * and having done this they should compute the transfer tax and pay the same forthwith out of the property transferred. The result is that the life tenant loses during the continuance of his estate the interest upon the corpus of the estate so paid out and eventually the remainderman receives his estate diminished by the amount of said payment * * *. As we read the statute the legislative intention is clear that the transfer tax shall be paid out of the corpus of the trust estate and not out of the income."

THE CASE *ESTATE OF BROWN* WAS NEITHER OVERRULED OR MODIFIED BY THE DECISION IN ESTATE OF DILLINGHAM.

Counsel for plaintiffs-in-error seem to contend that the *Brown* case, supra, was overruled or modified by the decision in *Estate of Dillingham,* 25 Haw. 129.

That case was entirely dissimilar from the one under consideration. In the first place there was no transfer to trustees the transfer having been made by the will directly to the four children of the testator.

"The record before us does not contain the pro-

visions of the will and codicils involved but from statements of counsel for the executors made in argument and acquiesced in by the Attorney General it appears that by the term of the will and codicils all of the residuary estate of the testator and which constitutes the bulk of his estate is bequeathed to his four children in equal portions and that it is the tax to be paid on these bequests that is here involved." See page 131 of decision in Dillingham case.)

In the second place the only question before the Supreme Court of Hawaii in the *Dillingham* case was the question as to whether or not the amount of money paid by the Executors in settlement of the Federal estate tax was deductible from the corpus of the estate before computing the amount of the tax due to the Territory of Hawaii from the four children to whom the bulk of the estate was transferred and to settle that matter the following question was reserved to the Supreme Court of the Territory, namely:

"Whether or not the estate tax paid or payable by said executors upon or in respect to said estate under the laws of the United States is deductible from the gross proceeds of said estate for the purpose of assessing and fixing *the values of said bequests* and the inheritance tax to which the same are liable under the laws of Hawaii."

That was the only question before the Supreme Court in the Dillingham case and how it can be twisted into a reversal or modification of the decision in the Brown case is beyond the comprehension of the writer.

THERE IS NO MANIFEST ERROR IN THE DECISION IN THE BROWN CASE AND THE RULE OF CONSTRUCTION OF A LOCAL LAW IS APPLICABLE.

In view of the fact that the Brown case was decided four years ago, that there have been three sessions of the local legislature since the date of that decision, and that under statutes identical with the Hawaiian statute the Courts of final jurisdiction in the States of Georgia and New York have rendered similar decisions, it cannot be said that the decision of the local Supreme Court is so manifestly erroneous as to render the rule of construction of a local law inapplicable.

In the case entitled *Territory of Hawaii* vs. *Hutchinson Sugar Co.,* 272 Fed. 856, at 859, this Court said:

"We consider the decision of the Supreme Court of the Territory in the case at bar a final determination of the law of the Territory which is binding on this Court."

SECOND QUESTION:

Did the devise and bequests to the Executors and Trustees, according to the terms and conditions of the trust, constitute a taxable transfer under the Hawaiian Statute?

It must be remembered and the point cannot be too strongly emphasized that, as pointed out in the analysis of the will, the "devotion" to the charitable purposes of the property transferred by the will to the trustees is at all times subject (a) to the fulfillment of the requirements upon the estate as set forth in paragraphs numbered 1 to 7 of the analysis and (b) to the decision

of the executors and trustees to devote either the excess or the whole income of the estate "to any business enterprise which they may approve."

It is therefore clear that the income of the estate may never be devoted to the charitable purpose for the reason that the said requirements upon the estate may never be fulfilled and for the further reason that the executors and trustees may decide to devote the excess or the whole income to new business enterprises of which they may approve.

There is therefore no duty imposed on the Trustees to devote the property transferred or the income thereof to the charitable purpose referred to in the will. In the exercise of their uncontrolled discretion they may devote a part of the income to the charity and a part to secular uses, or they may devote the entire income to secular uses.

The right of the "charity" referred to in the will to enjoy the income from the property is dependent therefore, entirely upon a contingency or condition and may be entirely "defeated" or "abridged" by the act of the trustees.

THE HAWAIIAN STATUTE IS CONTROLLING IN THIS CASE.

It seems entirely clear that the case comes squarely within the purview of Act 223, S. L. 1917, the last paragraph of section one of which provides in part as follows:

"When property passes as provided herein in trust * * * and the rights, interest or estates of the donees

are dependent upon contingencies or conditions whereby they may be wholly or in part * * * defeated, * * * or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this Act, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred."

The attempted devotion of this property to a charitable purpose may be entirely defeated or abridged by the act of the Trustees and the foregoing provision of the local statute plainly provides that where such contingencies or conditions exist the tax shall be imposed upon said transfer at the highest rate which would be possible upon the happening of any such contingency or condition. Let us assume that the Trustees, immediately upon the death of the testator and the probate of the will, had publicly announced their decision to regard the wishes of the testator as to the foundation of the educational purpose as an idealistic dream and to devote the whole income of the estate to other business enterprises without regard to the educational purpose and had by other acts evidenced their intention to maintain the "commercial character" of the estate.

If this situation existed and was made manifest to the taxing authorities in Hawaii at the time when the question of the assessment of an inheritance tax on this estate was before them can there be any doubt but that a tax would be legally assessable?

And this contingency may actually arise in the future.

It is respectfully submitted that the section of the Hawaiian Statute quoted above specifically covers this point and that the tax was rightfully assessed on the entire transfer to the Trustees.

THE DEFINITION OF THE WORD "DEVOTED" AS APPLIED BY THE TERRITORIAL SUPREME COURT IS SUPPORTED BY AUTHORITY.

The Supreme Court of the Territory based its decision largely on the dictionary meaning of the word "devoted" and that theory is supported by the cases.

A very interesting case on this point is that of *In re Duncan's Estate* (Wash.) 193 Pac. 694.

The testator in that case made certain bequests to trustees for charitable purposes one of which was as follows:

"I also declare that twenty thousand dollars ($20,000.00) of such funds shall be invested separately, and the income thereof shall constitute a fund to be known as the 'Benevolent Fund'. My trustees, at their absolute discretion, may make from this benevolent fund grants or contributions to members of the Mission of the Christian Church at Metlakahtla, Alaska, or elsewhere, in cases of distress and misfortune which may render them helpless or incapable of proper self-support.

"If at any time my trustees shall consider that the need or desirability of such grants from the benevolent fund has ceased, then the twenty thousand dollars ($20,000.00) and the income thereof may be merged into the general fund."

The question arose as to whether this and other transfers effected by the will were taxable transfers.

The statute of the State of Washington exempting bequests for charitable purposes is much narrower than the statute in Hawaii and it was decided that the other bequests were not such charitable purposes as were contemplated by the statute. But the bequest set forth in the provision of the will above quoted was admittedly within the purview of the Washington statute. The Supreme Court of Washington, however, held that the transfer was taxable because discretion was vested in the Trustees to devote the income of the fund to other purposes.

The Court on page 697 of the decision said:

"There is a provision in the will which sets aside $20,000 to be invested separately, the income from which shall constitute a benevolent fund, to be used by the trustees in their discretion for the relief of the distressed, unfortunate, and helpless, and though the principal sum is not to be consumed in charity, still we might hold it exempt from the tax but for the further provision that the trustees in their discretion may at any time determine that the need or desirability of such a fund has ceased, in which event the principal sum and the income therefrom shall be merged with the remainder of the estate. It is quite apparent from the record that the testator believed that the income from this fund would suffice to carry on the charitable work which he had been performing in the years immediately preceding the making of his will, such as distributing food to those who were without, and making advances to those who had met with misfortune, and this is added evidence that the main bequest is not charitable in the statutory sense. We have sought for some way to avoid a diminution of this fund but since it is wholly within the discretion of the trustees to divert the fund as and when they see fit, and when so diverted it must be treated as the

remainder of the estate, we see no escape from the conclusion that if to do good in this case we should lay down the rule that the fund is not taxable, we would thereby open a way by which the unprincipled might in all cases avoid the tax entirely."

A somewhat similar case is that of *Alfred University vs. Hancock,* 60 N. J. Eq. 470, 46 Alt. 178.

The New Jersey act provided for an exemption to "any bible or tract society, or religious institution, boards of a church, or organiation thereof."

Alfred University was a university with a "theological department" together with other academic and collegiate departments. The testator left the residue of his estate to Alfred University and it was claimed that the transfer was not taxable under the statute upon the ground that the university was a religious insitution, but the New Jersey Court in denying the claim of exemption said:

"Alfred University is, of course, not a bible or tract society. Nor can it be regarded as a religious institution. It is true, it has a theological department, which is an adjunct of the principal departments of the institution, which are academic and collegiate. If the theological department is to be regarded as religious, the two others are purely secular. An institution of such blended secular and religious qualities can in no sense be classed as a religious institution."

While the New Jersey case was not specifically decided on a dictionary meaning of the word devoted, it is authority for the proposition that the exemption cannot be claimed when there is a commingling of the charitable purposes with secular purposes, and that the fund must be wholly devoted to the charitable purpose

as announced by the Supreme Court of Hawaii in this case.

The use of the word "devoted" as applied to a claim of exemption from property taxation was construed in the case of *Grand Lodge of Masons vs. City of Burlington,* 84 Vt. 202, 78 Alt. 973.

In that case the Masons had constructed a Temple in the City of Burlington and the Lodge had by resolution provided that the income derived from the building should be applied first, to the payment of the debt thereon and, second, after the payment of the debt the income should be set apart into a fund for the purpose of securing a Masonic Home and for charitable uses "and that it be used for such purposes and such purposes only, forever."

"It was the claim of the plaintiff that said property was not taxable because it came within the provisions of the statute relating to the exemption of property from taxation because it was property 'devoted' to charitable uses."

The word "devoted" as used in the claim of exemption was not used in the statute but the Court said:

"But as the word 'devoted' as there used fairly means 'set apart' it is taken that the plaintiff claimed below that the property is sequestered in the sense of being set apart for charitable uses. We assume without deciding that the expenditure of the net income from the rent * * * for the purposes named in the resolution would be a charitable use of it within the meaning of the statute. But the time for such expenditure has not come and will not come until the Temple is paid for * * *. The mere intention to use the net income from the rent at some uncertain future

time, before the arrival of which the intention may be changed and the fund devoted to another and entirely different purpose is not a use of the property for charitable uses within the meaning of the statute."

THE PROPERTY OF THE ESTATE MAY NEVER VEST IN THE TRUSTEE FOR THE CHARITABLE PURPOSE.

Counsel for plaintiff-in-error on page 9 of their brief say that "the only private purpose that could by any possibility be implied" is where the trustees are empowered to accumulate sufficient land and capital for the introduction of Northern immigrant races. A rather lukewarm suggestion is made that this immigration proposition is a charitable purpose but in this statement they entirely ignore the provision of the will which makes the initiation of the educational scheme entirely subject for all time to the decision of the trustees to devote the entire income of the estate to any business enterprises of which they may approve. Is it any wonder that the Supreme Court of Hawaii said that the property and income of the Estate was "not devoted to the educational purpose in the sense in which the statute contemplates it should be."

It is true as stated in plaintiffs' brief, page 21, that the title to the property has vested in the trustees. But for what purpose? Can it be definitely now said that it has vested in them for a charitable purpose? We think not.

THE CASE OF LUNLALILO TRUSTEES VS. HAALILIO DISTINGUISHED.

The case of *Lunalilo Trustees vs. Haalilio,* 8 Haw. 640, is clearly distinguishable from this one. In that case the provisions of the will left nothing to the discretion of the trustees so far as the use to which the fund could be put was concerned. The trustees were directed to sell all of the real estate and to invest the proceeds until the total sum in the hands of the trustees should amount to $25,000.00 at which time the trustees were *ordered* to purchase land and erect a building thereon "for the use and accommodation of poor destitute and infirm people of Hawaiian blood or extraction." In that case the trust imposed was definite and certain both as to time, amount and purpose and as to those features of the trust left nothing to the discretion of the trustees. In this case the trust imposed, if it can be said that any charitable trust is imposed at all, is indefinite and uncertain both as to time and amount and may be entirely defeated by the Trustees' decision to devote the entire income of the estate to other business enterprises.

Federal Estate Tax:

It is admitted in the stipulation (Record 2) that there is a Federal estate tax chargeable against the estate in approximately the sum of $92,623.17.

The Federal law provides for a deduction from the value of the gross estate of "the amount of all bequests, legacies, etc.—to a trustee or trustees exclusively for

such religious, charitable, scientific, literary or educational purposes."

The only theory upon which the Federal tax could be levied is upon the theory that the devises and bequests to the trustees in this case were not *exclusively* for charitable or educational purposes, which was exactly the theory upon which the Supreme Court of Hawaii decided the same devises and bequests to be taxable under the Hawaiian statute.

It is respectfully submitted that the judgment of the Supreme Court of the Territory of Hawaii should be affirmed.

Honolulu, Hawaii, April 26, 1922.

HARRY IRWIN, Attorney General
of Hawaii, Attorney for Territory of Hawaii,
Defendant-in-Error.

ACKNOWLEDGMENT OF SERVICE:

Due service of a copy of the foregoing brief is hereby acknowledged, this 27th day of April, 1922.

ROBERTSON & CASTLE,
Attorneys for Plaintiffs-in-Error.

FREAR, PROSSER, ANDERSON & MARX, Attorneys for HAROLD K. L. CASTLE, Defendant-in-Error.